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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
REVIEW OF THE PRIME TIME	)	MM Docket No. 94-123
ACCESS RULE, SECTION 73.658(k)	)	
OF THE COMMISSION'S RULES	)	

TO: The Commission

REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

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SUMMARY

Despite the great changes that have taken place in the broadcast industry in the 25 years since the Prime Time Access Rule was enacted, the fundamental imbalance of power between the central networks and their highly dispersed affiliates has not been altered. PTAR remains a critical tool to ensure that local affiliates retain genuine programming choice during one hour of prime time. The affiliates continue to be among the strongest proponents of PTAR because they know that without a hard and fast rule guaranteeing local station programming choice, they would not have the bargaining power to reject network programming during this fourth hour of prime time. The repeal or potential relaxation of several other rules that served to check network power (such as the fin-syn rules and the network ownership ceilings) will only further increase the networks' power over their affiliates and make the retention of PTAR all the more imperative.

In their comments, the networks argue their traditional market power over their affiliates has been eroded by the changes of the previous 25 years. The networks point to difficulties in clearing certain dayparts as evidence of this supposed erosion of market power, yet the networks do not discuss their nearly 100% clearance rate during prime time, the period when PTAR applies. The networks also contend that the recent series of affiliate switches demonstrates the affiliates have obtained greater leverage. The affiliate switches, however, have also prompted the networks to draft new affiliation contracts that greatly restrict the affiliates' right to exercise programming discretion and preempt network programming. Finally, the networks argue the emergence of new networks helps tilt the balance of power back in favor of the affiliates. Omitted from this argument, though, is the fact that the growth over the past 25 years of new stations in the top 50 markets where PTAR applies far exceeds the growth in the number of new networks.

On the issue of the off-network component of PTAR, several commenters favored the retention of the restriction, yet none advanced credible arguments as to why the affiliates should continue to be barred from broadcasting off-network programming during the access hour. No commenter advanced a rational economic basis for continuing the off-network restriction or a sound policy argument for continuing to treat Fox differently from ABC, CBS, and NBC on this issue.

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NETWORK AFFILIATED STATIONS ALLIANCE

The Network Affiliated Stations Alliance ("NASA" or "Affiliates"), a coalition of the affiliate associations of the ABC, CBS and NBC Television Networks which represents the more than 600 television broadcast stations that are affiliated with these three networks, hereby files these reply comments to counter arguments advanced in favor of repeal of the prime time access rule ("PTAR"), 47 C.F.R. § 73.658(k) (1993). We also continue to believe, consistent with the Commission's goal of maximizing programming choices for local stations, that the off-network restriction contained in PTAR no longer serves a valid purpose and should be eliminated.

In their voluminous economic studies documenting the effects of PTAR, neither the networks nor any of the other commenters offered any significant evidence to demonstrate that the long-established power imbalance between the networks and their affiliates has shifted. It is this power imbalance that has made the protections of PTAR so vital. Without PTAR, the affiliates would have a substantially diminished capability to reject network programming, to the detriment of the viewing public. If the rule is repealed, the one hour of prime-time programming that the affiliates can now use for local programming -- local news, local public affairs, and local sports -- will be taken over by the networks. For, despite the changes in the broadcast industry since PTAR's adoption in 1970, the rule's aim of preserving local affiliate choice for one hour of prime time remains just as valid today as 25 years ago. Indeed, the repeal or potential relaxation of several other rules that served to check network power (such as the fin-syn rules and the network ownership ceilings) will only increase the networks' power over their affiliates and make the retention of PTAR all the more important.

I. PTAR SHOULD BE RETAINED IN ORDER TO PRESERVE LOCAL STATION PROGRAMMING CHOICE DURING ONE HOUR OF PRIME TIME.

A. The Imbalance in Power Between the Networks and Their Affiliates Has Not Changed.

The imbalance in power between CBS, NBC, and ABC (the three networks to which PTAR applies) and their widely dispersed affiliates was a principal reason behind the enactment of PTAR 25 years ago. As the Commission has long recognized, the relationship between the powerful, central networks and their separate affiliates, which depend on the network for most of their programming, has always been one in which the networks have held the upper hand. The dominant position of the networks in this relationship has enabled them to force their affiliates to accept network programming even when the affiliates wished to air locally originated or other alternative programming.

Because such coercion effectively restricts affiliates from broadcasting programs that in their judgment are what their local audiences wish to see, the Commission has long attempted to prevent it through measures such as the right-to-reject rule. This rule prohibits networks from compelling an affiliate to accept network programming which the station finds contrary to the public interest or preventing affiliates from substituting a program that in their judgment is "of greater local or national importance".[1/] The right-to-reject rule, however, has proven very difficult to enforce in practice. Given the limitations on the enforcement of the rule, the Commission realized that only a hard and fast rule that prevents the networks from programming a certain time period would be enforceable and would ensure that the affiliates would be able to exercise genuine choice over programming during that time.

It cannot be overemphasized that, despite all the changes that have occurred in the broadcasting market since 1970, the power imbalance between the networks and their affiliates has not changed. The clearest evidence of this is that it is the affiliates who continue to be the strongest

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[1/] 47 C.F.R. § 73.658(e).

proponents of the rule's retention. If, as the networks argued in their comments, the network feed restriction was causing affiliates to broadcast less popular programming during the access period and lose audiences as a result, then surely the affiliates would be the first to protest, for they would be most harmed. Likewise, if the affiliates genuinely possessed the ability to reject network programming, the affiliates would, of course, oppose PTAR. As logical decision-makers, they would wish to have the right to choose network programming (in addition to syndicated and locally originated programming) for the access period, and they would welcome the added competition of another program supplier. Indeed, one might naturally assume that the last thing the affiliates might wish is a restriction on their ability to broadcast potentially popular network fare during the first hour of prime time.

Network power over affiliates, however, remains so strong that the last thing the affiliates want is the "choice" to air network fare during the access period. For, the affiliates know that any post-PTAR offer by the networks to provide programming during the access hour will be an offer that the affiliates literally will not be able to refuse, and the affiliates will lose the opportunity to choose the access period programming that they believe their local communities most wish to see.

In their comments and the accompanying economic analysis prepared by Economists Incorporated, the networks present a vast array of data to demonstrate both the changes in the broadcast industry that have occurred since PTAR was adopted and the effects the rule has had on the public. Despite all the evidence they present on the impact of PTAR, the networks offer virtually no concrete evidence that their dominant position over the affiliates has been eroded. Rather, using largely anecdotal evidence, the networks argue that three trends demonstrate that the power imbalance between the networks and the affiliates no longer exists: (1) the difficulty networks have had in clearing certain dayparts; (2) the affiliate switches that have occurred in the last year; and (3) the emergence of the Fox, United-Paramount, and Warner Brothers networks. It is worthwhile to address each of these trends individually.

1. Network difficulty in clearing certain dayparts:

In their comments, both CBS and NBC contend that they have found it increasingly difficult to persuade their affiliates to clear network programming during certain dayparts. CBS, for example, points to its lack of success in clearing the 10:00-11:00 AM daypart and its subsequent abandonment of this time period as evidence of its limited power vis-a-vis its affiliates.[2] NBC, likewise, points to the low live clearance rates of certain daytime entertainment shows to make a similar point.[3] And, in the one bit of quantitative evidence offered, the Economists Incorporated study contends that the fact that the three networks combined programmed 25 fewer hours a week in 1994 than they did in 1977 "is a direct result of the affiliates' freedom to choose".[4]

In pointing to their difficulties with daytime clearances, however, none of the networks discusses the situation in prime time, the time period in which PTAR applies. According to the statistics provided by the networks, the clearance level during prime time during 1994 remained at the extraordinarily high level of 98%.[5] These statistics make clear that the imperative that drove the PTAR decision 25 years ago -- namely, the need to guarantee that affiliates could exercise genuine programming choice during some part of prime time -- remains as valid today as in 1970. The networks' complaints about clearances at 10:00 A.M. should not be allowed to obscure the fact that the purpose of PTAR is

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2/ Comments of CBS Inc. in MM Docket No. 94-123 (March 7, 1995), pp. 17-18.

3/ Comments of NBC, Inc. in MM Docket No. 94-123 (March 7, 1995), p. 28.

4/ Comments of Economists Incorporated ("EI Comments") in MM Docket No. 94-123 (March 7, 1995), p. 23.

5/ EI Comments, p. 90.

to allow the affiliates a genuine opportunity to exercise programming choice during prime time -- not mid-morning.

In light of the extremely high rates at which the networks are able to clear their prime time programming, it is very likely that, were PTAR repealed, the networks would clear a similarly high percentage of their programming during the access hour. The direct result would be that affiliates would be entirely shut out of prime time and communities would be deprived of locally chosen programming during the most important part of the viewing day. Thus, the networks' complaints about low clearances at 10:00 A.M. are irrelevant to the question as to whether the networks could use their dominant position to clear the entire four hours of prime time.

While on the one hand, the networks plead they lack the power to force programming on their affiliates,[6] they on the other hand have been very busy in the last year re-drafting affiliation agreements to make it even more difficult than at present for an affiliate to refuse to clear network programming. These new affiliation deals, which essentially ensure that the affiliates will not be able to preempt network programming, are discussed in the next section below. The

[6] According to NBC: "Network programs are cleared because network programming is generally high quality and popular, and therefore attracts a larger audience than an alternative program a station could obtain on its own in the marketplace." Comments of NBC, p. 26.

tight restrictions in these new affiliation contracts further demonstrate how difficult it would be for the affiliates to maintain any genuine programming choice during the access hour were PTAR to be repealed.

2. Affiliation Switches:

In the economic study commissioned by the networks, Economists Incorporated ("EI") contends that the series of affiliations switches that have occurred during the last year also demonstrates that affiliates are not disadvantaged in their position vis-a-vis the networks.[7] As the affiliates stated in their initial comments, however, these switches demonstrate not so much a shift in power between affiliates and their networks but rather a shift in power among the networks and, in particular, the emergence of Fox as a fourth network on par with ABC, CBS, and NBC. Many of the switches, moreover, were caused by the ripple effects of particular transactions, and now that these ripples have subsided, the general state of relations between the networks and their affiliates does not appear to have been significantly altered.

One positive result of these affiliation switches was that many affiliates were at last able to obtain more generous compensation packages from the networks. These compensation increases, however, carried stringent conditions, the most important of these was the limitation on the

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[7] EI Comments, p. 22.

affiliates' ability to preempt network programming in the new set of network-affiliate contracts. In these new contracts, the networks have used their leverage to force affiliates to agree to language that essentially writes the Commission's "right-to-reject" rule out of existence.

The Fox network, for example, pioneered the technique of limiting affiliates' preemption rights only to "fast-breaking news events". Affiliates cannot air local sports, local political debates, charity telethons or even a non-news public affairs show without putting their affiliation at risk, for just one "unauthorized preemption" could lead to termination of the entire agreement. The NBC network is following Fox's lead. The new agreements that some NBC affiliates are being offered require an affiliate to commit that it "does not foresee any need to substitute programming of any kind for NBC programming, except in those circumstances requiring local live coverage of news events."

Both the NBC and Fox contracts also restrictively define what "unsatisfactory" programming means. Both sets of contracts allow affiliates to preempt programming only when it actually violates an FCC rule, is of poor engineering quality, or does not meet "contemporary standard of good taste". Even "good taste" is defined as programming that is consistent with what the network has broadcast before, a definition so broad as to prevent almost any preemption on such grounds. The contracts also require affiliates to commit that "sporting events" will never be substituted for network programming. NBC, moreover, insists that the agreements be kept secret, with exhibits and side-letters not to be filed at the FCC even though the FCC's rules require them to be public.[8] Given the language of these contracts, the affiliates cannot be said to be in any better position with regard to the key issue of programming choice than before the affiliation switches took place.

3. The emergence of the new networks:

The networks also contend that the emergence of the Fox network as well as the commencement of the Warner Brothers and United Paramount networks has further strengthened the affiliates in their bargaining position vis-a-vis the networks. What the networks ignore, however, is the fact that the growth of independent stations in the top 50 markets has greatly exceeded the emergence of new networks in the 25 years since PTAR was enacted.

The networks argue that the greater the number of networks, the greater the leverage affiliates possess in dealing with the networks. Certainly the emergence of Fox has given affiliates greater leverage with the networks; until Warner Brothers and United Paramount establish themselves as

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[8] The Commission recently has made clear that the filing of redacted or incomplete affiliation agreements does not comply with its rules. _See_ Amendment of Part 73 of the Commission's Rules Concerning the Filing of Television Network Affiliation Contracts, Notice of Proposed Rule Making, FCC 95-145, slip op. at 10 (MM Docket No. 95-40, April 5, 1995).

viable networks, however, they are not likely to have significant influence over the current relationship between the older networks and their affiliates. Though the affiliates are in a better position vis-a-vis the networks than before the rise of Fox and the creation of two new networks, what the networks fail to mention is that the growth in the number of television stations since 1970 has far outstripped the growth in the number of networks.

At one point in their study, EI contends: "The number of new networks seeking affiliates -- three -- exceeds the growth in the average number of new independents per market since 1970, which is less than two."[9/] Citing the growth in the average number of independents for all markets is more than a little disingenuous, for only a few pages before, EI cites a far more relevant statistic: the growth in the number of independent stations per market in the top 50 markets where PTAR applies. According to EI's own submission: "The average number of independent stations in the top 50 markets has increased from 1.3 per market in 1970 to 5.8 today.[10/] The result of this rapid growth in the number of independent stations in the top 50 markets is that the established networks, even in the face of competition from the new networks, enjoy a better bargaining position vis-a-vis

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9/ EI Comments, p. 22, n.51.

10/ Id. at 10.

local stations in these markets than they did 25 years ago. The growth of cable and its reduction of the UHF handicap further strengthens this bargaining advantage.

B. **Current Trends in the Broadcast Industry Increase Network Power Over Affiliates.**

The repeal or relaxation of important, long-standing broadcast regulations will further increase network power over affiliates. The most influential of the changes are the repeal of the financial interest and syndication ("fin syn") rules and the potential raising of the national ownership ceiling. The elimination of the fin syn rules and the relaxation of the ownership caps allows the networks to vertically integrate the production, distribution, and local broadcast aspects of their business. A greater degree of vertical integration for the networks will mean less flexibility and bargaining power for the affiliates.

According to the study performed by Professors Williamson and Woroch for the Coalition to Enhance Diversity, the elimination of the fin syn rules has allowed the networks to more than double the share (from 13% to 31%) of prime-time programming that they produced in-house from 1989 to 1994.[11/] On the broadcast side, Congress is considering legislation that would increase the national ownership cap from its current 25% level to 35% or 50%. The Commission also has

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11/ Comments of Oliver Williamson & Glenn Woroch in MM Docket No. 94-123 (March 7, 1995), pp. 7-8.

proposed increasing the caps to 50% over a period of years.[12] As the affiliates have argued in separate comments, allowing the networks to own stations with 50% of the national audience will give the networks tremendous leverage over the affiliates they do not own.[13]

The twin steps of allowing the networks to move forwards into local broadcasting (with the proposed substantial relaxation of the local ownership cap) at the same time they are already moving backwards into program production (with the repeal of the fin syn rules) will encourage the networks to achieve a substantially greater degree of vertical integration than at present. Such increased vertical integration will undermine the autonomy of affiliates and alter this country's traditionally decentralized system of broadcasting. Given such a scenario, the retention of PTAR -- with its emphasis on the preservation of local affiliate autonomy -- becomes all the more imperative.

C. PTAR Serves the Important Interest of Preserving Local Programming Choice.

Much of the data produced by the networks actually serves to buttress one of the main arguments of the affiliates in favor of retaining PTAR: namely, the rule is an essential

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12/ See Notice of Proposed Rule Making in MM Docket No. 91-221 (released January 12, 1995) pp. 44-45.

13/ See Comments of Network Affiliated Stations Alliance in MM Docket No. 91-221 (May 17, 1995).

measure to preserve the substantial amounts of local and public interest programming that is currently aired during the access hour. According to the networks' study: "[A]ffiliates of ABC, CBS, and NBC showed local news and public affairs programming during 43% of all affiliate hours" during the first half hour of the access period (7:00-7:30 PM).[14/]

As long as PTAR continues in effect, moreover, local affiliates enjoy the certainty that programming decisions in the access hour are entirely for them to make. Such certainty is necessary to encourage affiliates to invest the substantial capital necessary to create their own local programming. Were PTAR to be repealed, the mere threat that the networks could reclaim the access hour would be enough to discourage many local affiliates from making such investments in local programming.

II. NO COMMENTER ADVANCED SOUND ARGUMENTS IN FAVOR OF RETAINING THE OFF-NETWORK RESTRICTION.

In our Comments, the Affiliates argued that while PTAR in general ought to be retained, the off-network aspect of the rule ought to be repealed. The core of our argument was that PTAR is essential to enable the affiliates to resist network pressure and exercise genuine programming choice during one hour of prime time. At the same time, we argued that the off-network restriction actually works to frustrate

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[14/] Id. at 61.

the rule's primary goal of maximizing local stations' programming choices by denying them the right to broadcast off-network programs during the access hour. Though certain commenters, such as the Law and Economics Consulting Group ("Consulting Group"), urged retention of the off-network restriction, none advanced credible policy arguments in favor of such a step.

In the economic study commissioned by the Association of Independent Television Stations, King World Productions and Viacom, the Consulting Group contends that the off-network restriction is necessary to give affiliates incentive to purchase syndicated programming. The Consulting Group argues that first-run programming is more expensive than off-network programming; therefore, in the absence of PTAR, stations would be less likely to purchase first-run programs even if they are more popular with audiences than off-network shows because they are more expensive.[15/] The basis of this contention is the astonishing assumption that:

> because any contribution to original sunk costs that may date back years is better than none, off-network suppliers compete with first run suppliers at this stage as

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[15/] The Consulting Group argues: "Quality first run programs need higher ratings in order to compete with lower cost off-network programs and PTAR is a necessary corrective for this bias." Comments of the Law and Economics Consulting Group in MM Docket No. 94-123 (March 7, 1995), p. 2.

if distribution costs were all that mattered.[16]

Such an assumption flies in the face of the realities of program production economics. As the Coalition to Enhance Diversity demonstrates, program producers not only calculate the potential back-end, off-network revenues that programs earn but indeed rely on those earnings to turn a profit.[17] Indeed, one of the chief concerns of the program producers is that the off-network restriction prevents them from earning a reasonable back-end return and therefore makes production of high-quality, high-cost network programming increasingly uneconomical.

By limiting syndication revenues available to producers of high-quality network programming, the off-network restriction serves only to subsidize the three syndication companies who control the market for non-news programming during the access period. According to the study prepared for the networks, King World, Paramount and Fox together account for 89% of the non-news programming aired during the access period.[18] It is hard to imagine why these programming giants need the subsidy that the off-network restriction

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[16] Id., p. 65.

[17] Comments of the Coalition to Enhance Diversity in MM Docket No. 94-123 (March 7, 1995), pp. 16-19.

[18] EI Comments, p. 59.

provides them, and they make no convincing arguments why the subsidy should be continued.

The final argument that the affiliates advanced in favor of eliminating the off-network restriction was that there was no policy rationale to justify treating Fox differently from ABC, CBS, and NBC on the question of off-network programming. The affiliate switches have highlighted the arbitrariness of treating Fox differently from the three older networks, and no commenter ventured to argue why Fox and its affiliates should continue to receive special benefits not available to the three older networks and their affiliates. Any policy that treats such similarly situated entities (such as Fox and the three older networks) in such a disparate fashion as PTAR does should only be continued on the basis of strong evidence of its necessity; such evidence was certainly not produced by commenters in this proceeding.

III. CONCLUSION

For these reasons, the Commission should maintain PTAR but eliminate its off-network restriction. These actions will foster a fair and rational marketplace for television programming and maintain the crucial balance of power between networks and affiliates.

Respectfully submitted,

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